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THE SETTLEMENT OF DISPUTES BY ARBITRATION.

A MOVEMENT has recently gained considerable headway in this country to overturn the well settled common law rule that executory agreements to arbitrate disputes are revocable.¹ Congress² and the legislatures of New York,³ New Jersey,⁴ Massachusetts,⁵ and Oregon⁶ have recently enacted laws designed to effect this result.⁷ Where such laws are in force it is no longer possible for one to enter into a solemn agreement with another to arbitrate in case any dispute should arise, and later, when a dispute has arisen, resort directly to the courts, in total disregard of such agreement.

Laws of this kind are designed to make it possible to escape to some extent three of the principal evils inherent in present day litigation.

First, the delays caused by congested court calendars, preliminary motions and other steps which litigants may take, and the almost inevitable appeals. Very often the delays thus caused result in a substantial denial of justice altogether.

Second, the expense of litigation.

Third, the inability of judges and juries satisfactorily to decide matters which, because of their complexity, require more consideration than

¹ For a full statement of the common law rule, see *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 120, 68 L. Ed. 582, 44 Sup. Ct. Rep. 274 (1924) *Martin v. Vansant*, 99 Wash. 106, 108, 168 Pac. 990, 991 (1917).

Act of Feb. 12, 1925, c. 213 (43 Stats. at Large 883).

³ N. Y. Laws of 1920, c. 275; Cons. Laws, c. 72.

⁴ N. J. Laws of 1923, c. 134, p. 291.

⁵ Mass. Acts and Resolves, 1925, c. 294.

⁶ Ore. General Laws, 1925, c. 186, p. 279. This act is very similar to the Washington statute (note 12 *infra*) except that it specifically provides that where suit is brought upon a contract containing a provision for arbitration, the suit shall be abated upon application.

⁷ In Illinois, executory agreements to arbitrate *existing* disputes are irrevocable: Ill. Laws of 1917, p. 202 (see *White Eagle Laundry Co. v. Slawek*, 296 Ill. 240, 129 N. E. 753 (1921)). But executory agreements to arbitrate disputes which may arise in the *future* do not prevent immediate resort to the courts: *Cocalis v. Nazlides*, 308 Ill. 152, 139 N. E. 95 (1923).

In Pennsylvania, an executory contract to arbitrate prevents either party from maintaining an action only when the submission names the particular person or tribunal to which the dispute shall be submitted. See *Gowen v. Pierson*, 166 Pa. St. 258, 264, 31 Atl. 83, 84 (1895), *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407, 414 (1886) *Hartup v. Pittsburgh*, 97 Pa. St. 107, 119 (1881).

Wisconsin recently passed an act much similar to the New Jersey law, but as the provisions for making arbitration agreements irrevocable and for staying actions brought in disregard of such agreements were omitted, the act merely outlines the procedure to be followed where both parties desire to perform their agreement to arbitrate. Wisc. Laws of 1923, c. 447.

the press of litigation will permit, or matters which, because of their technical nature, can only be adequately determined by technical men.⁸

Where such acts are in force business men may, by inserting a clause⁹ requiring arbitration in their contracts, have their disputes disposed of promptly and inexpensively by men of their own trade or calling.¹⁰

A bill modeled upon the New Jersey arbitration law was introduced in the Washington legislature during the last session.¹¹ While it passed in the house, it was not reached in the senate. But the passage of such a law is not necessary in order to make available to the people of Washington this method of settling their differences, for it has never been possible in Washington to sue in disregard of an agreement to arbitrate. The Arbitration Act of 1860,¹² as interpreted by the

⁸ See "The United States Arbitration Law and Its Application," 11 A. B. A. JOUR. 153.

These defects in present-day litigation are largely responsible for the rise of the arbitration movement. The first legislative result of this movement was the Illinois Act of 1917 (note 7, *supra*). The combined efforts of the New York State Chamber of Commerce and the New York State Bar Association resulted in the passage of the New York Arbitration Act of 1920 (note 3, *supra*). See Cohen, "The Law of Commercial Arbitration and the New York Statute," 31 YALE L. JOUR. 147. The New Jersey, Massachusetts, Oregon and federal acts followed. (See notes 2-6, *supra*.)

The Arbitration Society of America was organized in New York City in 1922 to provide facilities for arbitration and to encourage the adoption of arbitration laws. See Wheless, "Arbitration as a Judicial Process of Law," 30 W. VA. L. Q., 209, 228. During 1925 the Arbitration Foundation, Inc., and the Arbitration Conference were organized to supplement the activities of the earlier association. These three organizations have recently been merged into a new association known as the American Arbitration Association. In Chicago an organization called the Commerce Court of Arbitration handles a large number of trade disputes. It has adopted a very complete set of rules of procedure. See Greene, "Adjudication of Civil Causes by Arbitration," 4 ILL. L. Q. 153.

A Uniform Arbitration Act was finally approved by the American Bar Association at its annual meeting in Detroit in September, 1925, and recommended to the several states for enactment. 50 AM. BAR ASS'N REPORTS (1925), 135-162 (for text see p. 587). This act provides for the enforcement of agreements to arbitrate *existing* disputes only. The matter had been before the association for several years, but a disagreement as to whether or not such an act should include also *future* disputes had prevented the approval of any act. Prior to this action on the part of the association it had taken the opposite position through its Committee on Commerce, Trade and Commercial Law, which drafted the federal act. See note 2, *supra*; pp. 257-258, *infra*.

⁹ For forms of arbitration clauses and agreements see 5 WILLISTON ON CONTRACTS, pp. 1-8.

¹⁰ For a discussion of the extent to which arbitration is being used in England and New York and for examples of cases recently submitted to arbitration in New York, see Grossman, "Trade Security Under Arbitration Laws," 35 YALE L. JOUR. 308 (Jan. 1926).

¹¹ House Bill No. 168. This bill was almost identical with the New Jersey Arbitration Act (note 4, *supra*).

¹² Laws of 1860, p. 323. It was re-enacted, with slight modifications, in 1863 as sections 231-241 of the Civil Practice Act. It is now included in Remington's Compiled Statutes as sections 420-430. The law as it exists today differs only slightly from the law as originally enacted.

Supreme Court, makes arbitration, or a tender thereof, where the parties have agreed to arbitrate, a condition precedent to a cause of action.¹³

I.

AN AGREEMENT TO ARBITRATE AS A BAR TO ANY ACTION

At Common Law.

The doctrine of the revocability of executory contracts to arbitrate apparently originated in a *dictum* of Lord Coke's.¹⁴ In *Vynior's Case*¹⁵ Lord Coke stated that a party might revoke the authority which he had given arbitrators, just as he might revoke the authority of any other agent, which would result in the parties being left with only the courts in which to settle their differences. The contract feature of the situation went unnoticed. In the next century the King's Bench arrived at the same conclusion in *Kill v. Hollister*¹⁶ but the court, although it cited no authorities, seems to have realized the infirmity in the reasoning in *Vynior's Case*, for it rested its decision upon the principle that one can not contract so as to oust the courts from jurisdiction. The real explanation of these cases is probably found in Lord Campbell's suggestion¹⁷ that the doctrine originated "in the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction," concerning which it has been said. "A more unworthy genesis cannot be imagined."¹⁸ Forty years later, however, Lord Kenyon reached the opposite conclusion in *Halfhide v. Fenning*,¹⁹ sustaining a plea to the effect that the contract between the parties provided for the arbitration of all differences which might arise and that no arbitration had been had. But a few years later, in 1793, the doctrine of the earlier cases was reaffirmed in *Mitchell v. Harris*,²⁰ and *Kill v. Hollister* was cited in support of the decision. Thus the matter stood for a number of years.

This, then, was the state of the law in England at the time when the courts of the older states in this country were first considering the

¹³ *Infra*, pp. 248-254.

¹⁴ For a history of this rule see Cohen, *COMMERCIAL ARBITRATION AND THE LAW* (1918), and Cohen, *op. cit.*, note 8, *supra*.

For a full discussion of the rule, see 3 WILLISTON ON CONTRACTS, §§ 1719 *et seq.*, 1927 *et seq.*, 4 PAGE ON CONTRACTS, §§ 2527 *et seq.*, 2546 *et seq.*

¹⁵ 8 Coke 81b (K. B.), 77 Eng. Rep. 595 (1609).

¹⁶ 1 Wils. (K. B.) 129, 95 Eng. Rep. 532 (1746).

¹⁷ *Scott v. Avery*, 5 H. L. Cas. 811, 853, 10 Eng. Rep. 1121 (1856).

¹⁸ *United States Asphalt R. Co. v. Trinidad Lake P. Co.* (D. C., N. Y.), 222 Fed. 1006, 1007 (1915).

¹⁹ 2 Bro. Ch. 336, 29 Eng. Rep. 187 (1788).

²⁰ 2 Ves. Jr. 129, 30 Eng. Rep. 557 (1793).

matter and looking to English cases for their rules of decision. It is not surprising, therefore, that the prevailing rule in the United States is in accord with the English law as it existed at this time.

It was not long, however, before the rule began to be questioned in England. In 1844 Lord Sugden stated²¹ that he believed that *Halfhide v. Fenning* was still law. The march to overturn the rule of *Vynior's Case* commenced with *Scott v. Avery*.²² Subsequent cases, aided no doubt by the English Arbitration Act of 1899,²³ continued the movement until the law was finally settled in England as it exists today, namely, that one can not sue in disregard of an agreement to arbitrate.²⁴

The common law rule, it should be noted, does not hold that an executory agreement to arbitrate is void. While it can not be pleaded in bar of an action, and will not support a motion to stay,²⁵ it will support an action for damages for its breach.²⁶ Before penalties were abolished this was an effective remedy, for the agreement might be drawn up in the form of a bond for the sum which either party claimed was due him, conditioned on abiding by the agreement to arbitrate.²⁷ But today this remedy is ineffectual because it is ordinarily impossible to prove more than nominal damages unless, for example, expenses have been incurred in preparation for arbitration.²⁸ Nor will such agreements be specifically enforced.²⁹ But once executed—that is, where an award has been made—no action can be taken in disregard of the award.³⁰ If the arbitration agreement is made a rule of court,

²¹ *Dimsdale v. Robertson*, 2 J. & La T. 58, 92 (Irish Ch. 1844).

²² Note 17, *supra*.

²³ 52 and 53 Vict., c. 49.

²⁴ *Hamlyn & Co. v. Talisker Distillery*, [1894] A. C. 202; *Smith, Coney & Barrett v. Becker Gray & Co.*, [1916] 2 Ch. 86; *Stebbing v. L. & L. & G. Ins. Co., Ltd.*, [1917] 2 K. B. 433; *Clements v. County of Devon Ins. Co.*, [1918] 1 K. B. 94; *Woodall v. Pearl Assur. Co., Ltd.*, [1919] 1 K. B. 593.

²⁵ *Street v. Rigby*, 6 Ves. Jr. 815 (Ch.), 31 Eng. Rep. 1323 (1802); *Tobey v. County of Bristol*, 3 Story 800, 819 (1845); *Hurst v. Litchfield*, 39 N. Y. 377 (1868); *Haggart v. Morgan*, 5 N. Y. 422, 427 (1851) and authorities cited in notes 1 and 14, *supra*.

²⁶ *Vynior's Case*, note 15, *supra*; *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 385, 34 L. Ed. 708, 11 Sup. Ct. Rep. 133 (1890); *Doleman & Sons v. Ossett Corp.*, [1912] 3 K. B. 257, 267; *Finucane Co. v. Board of Education*, 190 N. Y. 76, 83, 82 N. E. 737, 739 (1907); *Miller v. Canal Co.*, 41 N. Y. 98 (1869).

²⁷ See Cohen, *COMMERCIAL ARBITRATION AND THE LAW* (1918), c. 12.

²⁸ *Doleman & Sons v. Ossett Corp.*, note 26, *supra*; *Munson v. Straits of Dover S. S. Co.*, 99 Fed. 787 (D. C., N. Y.), 102 Fed. 296 (C. C. A., 2d Cir., 1900); *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633, 52 N. E. 671 (1899); *Miller v. Canal Co.*, note 26, *supra*.

²⁹ *Street v. Rigby*, note 25, *supra*; *Tobey v. County of Bristol*, note 25, *supra*; *Cogswell v. Cogswell*, 70 Wash. 178, 182, 126 Pac. 431, 432 (1912).

³⁰ *Karthauss v. Ferrer*, 1 Pet. 222 (1828); *Burchell v. Marsh*, 17 How. 344 (1854); *Bayne v. Morris*, 1 Wall. 97 (1863). But see *Taylor v. Basye*, 119 Wash. 263, 205 Pac. 16 (1922); *Owen v. Casey*, 48 Wash. 673, 94 Pac. 473 (1908).

no action can be brought in disregard of it.³¹ And where the agreement provides for the submission to arbitration of incidental matters only and makes it a condition precedent to a cause of action, leaving the general question of liability to judicial decision, action may only be brought after the incidental matters have been determined by the arbitrators.³²

Various reasons have been given for the rule.³³ *Vynior's Case*³⁴ proceeded upon the ground of the revocability of the arbitrators' authority;³⁵ this theory has been almost entirely abandoned.³⁶ It has been said that it is against public policy to enforce an agreement to forego the right to resort to the court;³⁷ that the agreement to arbitrate is collateral only;³⁸ and that such agreements violate the spirit of the laws creating the courts.³⁹ But usually the matter is disposed of with the simple statement that "agreements in advance to oust the courts of jurisdiction conferred by law are illegal and void."⁴⁰

The rule has been subject to constant attack and criticism in this country as founded on error and followed merely because of its antiquity.⁴¹ Serious attempts have been made to get the courts to correct the error without legislative aid, but so far none have felt at liberty to overturn a rule so well established.⁴²

³¹ 9 and 10 WIL. III, c. 15; *Heckers v. Fowler* 2 Wall. 123 (1864) *McCann v. Alaska Lumber Co.*, 71 Wash. 331, 128 Pac. 663 (1912). See *Burrell v. United States*, 147 Fed. 44 (C. C. A., 9th Cir., 1906).

³² *Hamilton v. Home Ins. Co.*, note 26, *supra*; *Hamilton v. Liverpool, L. & G. Ins. Co.*, 136 U. S. 242, 34 L. Ed. 419, 10 Sup. Ct. Rep. 945 (1890) *Martinsburg & Potomac R. R. Co. v. March*, 114 U. S. 549, 29 L. Ed. 255, 5 Sup. Ct. Rep. 1035 (1885), *Cogswell v. Cogswell*, note 29, *supra*.

³³ See the able opinion of Judge Hough in *United States Asphalt R. Co. v. Trinidad Lake P. Co.*, note 18, *supra*.

³⁴ Note 15, *supra*.

³⁵ See *Ore. Sav. Bank v. Am. Mtg. Co.*, 35 Fed. 23 (C. C., Ore., 1888), *Tobey v. County of Bristol*, note 25, *supra*.

³⁶ See *Martin v. Vansant*, note 1, *supra*, 99 Wash., p. 117, 168 Pac., p. 994.

³⁷ *Hurst v. Litchfield*, note 25, *supra*; *Prince Steamship Co. v. Lehman*, 39 Fed. 704, 5 L. R. A. 464 (D. C., N. Y., 1889).

³⁸ *Hamilton v. Home Ins. Co.*, note 26, *supra*; *Dawson v. Fitzgerald*, 1 Ex. D. 257 (C. A., 1876).

³⁹ *Meacham v. Jamestown F. & C. R. R. Co.*, 211 N. Y. 346, 105 N. E. 653 (1914).

⁴⁰ *Insurance Co. v. Morse*, 20 Wall. 445, 451 (1874) *Perkins v. U. S. Electric Light Co.*, 16 Fed. 513 (C. C., N. Y., 1881). See *Guaranty Trust, etc., Co. v. Green Cove, etc., R. Co.*, 139 U. S. 137, 35 L. Ed. 116, 11 Sup. Ct. Rep. 512 (1891).

⁴¹ *U. S. Asphalt R. Co. v. Trinidad Lake P. Co.*, note 18, *supra*; *Atlantic Fruit Co. v. Red Cross Line*, 276 Fed. 319 (D. C., N. Y., 1921) *Aktieselskabet Korn, etc., v. Rederiaktiebolaget Atlanten*, 250 Fed. 935, 939 (C. C. A., 2d Cir., 1918), *D. & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 257 (1872).

⁴² *Ibid.* And see *Berkovitz v. Arbib & Houlberg*, 230 N. Y. 261, 276, 130 N. E. 288, 292 (1921).

In Washington.

The provisions of the Washington statutes which the Supreme Court thought overturned the common law rule and made arbitration a condition precedent to a cause of action are as follows:⁴³

"All persons desirous to end, by arbitration, any controversy, suit, or quarrel, except such as respect the title to real estate, may submit their difference to the award or umpirage of any person or persons mutually selected.

"Said agreement to arbitrate shall be in writing, signed by the parties, and may be by bond in any sum, conditioned that the parties entering into said submission shall abide by the award."

There is nothing in this language requiring that the common law rule be overturned. In other states where similar provisions are in force they have not been interpreted as effecting this result.⁴⁴

There is no decision in the early Washington reports specifically interpreting these provisions as changing the pre-existing law. But from the first the court recognized that the Washington rule differed from that in effect elsewhere. In a case in the fifth volume of the Washington reports⁴⁵ the court referred to the fact that the statute was peculiar and that the court could "get but little aid from the citation of authorities."⁴⁶ A few years later a defendant set up an arbitration agreement as a plea in bar and apparently would have prevailed had the dispute in question been included in the agreement, for the court said that "courts will enforce contracts to arbitrate disputes and make the decision of arbitrators final" where this is clearly the intention, but that where such intention is not clear the courts will construe the agreement "in favor of the right to resort to the courts for redress in the usual manner."⁴⁷

*Hughes v. Bravinder*⁴⁸ is the first case enforcing arbitration as a

⁴³ Rem. Comp. Stat., §§ 420, 421.

⁴⁴ Most states have some sort of statutory provision applying to arbitration. See 3 WILLISTON ON CONTRACTS, § 1930; Grossman, *op. cit.* note 10, *supra*, p. 323. In all of these states the common law rule is apparently in effect. 3 WILLISTON ON CONTRACTS, § 1721, 4 PAGE ON CONTRACTS, §§ 2527, 2546. The statutes in some states specifically recognize the right to revoke an executory agreement to arbitrate. See Cal. Code of Civ. Proc., § 1290; N. Y. Code of Civ. Proc., § 2383, Civil Practice Act, § 1466 (now repealed by the Arbitration Act, note 3, *supra*.)

⁴⁵ *Tacoma R. & M. Co. v. Cummings*, 5 Wash. 206, 207, 31 Pac. 747, 33 Pac. 507, 508 (1892).

⁴⁶ See also *Zindorf Const. Co. v. Western Am. Co.*, 27 Wash. 31, 67 Pac. 374 (1901), where the court refused to go into the decisions of other states for aid in deciding a question involving the law of arbitration.

⁴⁷ *Van Horne v. Watrous*, 10 Wash. 525, 527, 39 Pac. 136 (1895).

⁴⁸ 9 Wash. 595, 38 Pac. 209 (1894) 14 Wash. 304, 44 Pac. 536 (1896).

condition precedent, but neither the common law rule nor the statute was referred to by the court. This case grew out of a building contract which provided that the owner's superintendent should decide all matters of performance, extras, and "the amount of damages which may accrue from any cause," and declared his "decision on all matters to be finding and conclusive to all parties concerned." The contractor sued for the balance of the contract price still due, for extras, and for damages. Upon the first appeal the court reversed the trial court's action in dismissing the suit and granted a new trial upon the ground that the plaintiff should have been given judgment for the balance due on the purchase price, over which there was no dispute, and for those extras and damages which had been allowed by the superintendent. Upon the second appeal the court sustained the action of the trial court in dismissing the suit without prejudice to further proceedings before the superintendent, because it appeared from the evidence that the plaintiff had broken up and prevented further hearings before the superintendent when the defendant commenced to introduce evidence in support of his claim for damages.

The next case, *Zindorf Construction Co. v. Western American Co.*,⁴⁹ was the first to refer to the statute or to cite any authorities. This case arose out of a contract which contained the following arbitration provision:⁵⁰

"The superintendent of the party of the first part (the defendant) is hereby constituted an arbitrator, to whom shall be submitted any dispute arising out of this agreement, or the performance thereof; and his word in the matter shall be final, conclusive, and without appeal therefrom."

Disputes arose between the parties, and the plaintiff brought suit. The defendant appeared and demurred to the complaint. Thereafter the defendant served a notice of arbitration upon the plaintiff. The latter refused to join in the arbitration. Thereupon, the defendant proceeded to present its case to the arbitrator, obtained an award and had judgment entered in accordance with the statutory procedure. The defendant then filed a motion in the action commenced by the plaintiff, asking that the suit be dismissed. This motion was granted by the trial court, and its action was affirmed on appeal. The Supreme Court in its opinion referred to the statute and the previous cases on the subject, and said:⁵¹

"There can be no mistake as to the meaning of the words. No ambiguity or uncertainty can be attributed to them. There

⁴⁹ Note 46, *supra*.

⁵⁰ 27 Wash. p. 32, 67 Pac. p. 374.

⁵¹ 27 Wash. pp. 38, 41, 67 Pac. pp. 376, 377.

was a plain, solemn agreement to submit matters in dispute arising out of said contract to an arbitrator. The matters involved in this suit arose directly out of that contract. The court found that appellant commenced this action without even demanding or offering to arbitrate the matters in dispute, and that it has never at any time before or since the bringing of the action offered to arbitrate or demanded the same. Is the appellant, notwithstanding such failure to demand an arbitration, entitled to maintain this suit? All questions of public policy as to the propriety of arbitration seem to have been already resolved in this state, both by the legislature and by the courts, in favor of recognizing it as a method by which disputing parties may settle their differences.

"The demurrer to the amended complaint, if it had been passed upon, should have been sustained for failure to show an effort to arbitrate, or a refusal on the part of the arbitrator, but since the demurrer was never passed upon, and the court tried the question of fact upon the motion to dismiss, the same result was reached."

The leading Washington case on the irrevocability of arbitration contracts is *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.*⁵² The contract out of which the dispute in this case arose contained the following arbitration clause:⁵³

"Any dispute which may arise between the parties hereto shall be left to the decision of a board of arbitrators. The decision of a majority of this board shall be final and both parties hereto agree to accept such decision of a majority as final and binding."

A dispute arose and the plaintiff brought suit. At the close of the plaintiff's case the defendant moved for a non-suit upon the ground that the plaintiff had failed to show any offer of or demand for arbitration.⁵⁴ The trial court overruled the motion and gave judgment for the plaintiff. Defendant appealed. The court, in reversing the decision of the trial court, said:⁵⁵

"Of the errors assigned, the only one we find it necessary to notice is the refusal of the court to grant the motion for non-suit. The refusal to grant this motion we think was error. We have held in a long line of cases that, where parties enter into a contract, and provide therein that all

⁵² 81 Wash. 592, 142 Pac. 1153 (1914).

⁵³ 81 Wash. p. 593, 142 Pac. p. 1153.

⁵⁴ Apparently this objection was raised for the first time by this motion. It does not appear to have been raised in the answer. See 81 Wash. p. 594, 142 Pac. p. 1154.

⁵⁵ 81 Wash. p. 595, 142 Pac. p. 1154.

differences between them that may thereafter arise out of the contract shall be submitted to a board of arbitrators whose decision therein shall be conclusive and final upon the parties, no action can be maintained on the contract by either party until he has tendered arbitration of the differences to the other party, and such other party has refused the tender."⁵⁶

*Dickie Manufacturing Co. v. Sound Construction & Engineering Co.*⁵⁷ is a case of importance in this connection not only because of the decision, but also because of the *dicta* and review of cases contained in the opinion. In this case controversies had arisen between the parties and they had signed an arbitration agreement by which each party was to appoint an arbitrator, and the two thus appointed were to select a third. The arbitrators were appointed and hearings commenced. After a number of hearings had been had the plaintiff's arbitrator withdrew, and the plaintiff refused to appoint a successor, announcing that it was no longer bound. Thereafter the plaintiff brought suit on its claims. The two remaining arbitrators proceeded with the hearings and made an award. This award was filed, and judgment entered thereon in accordance with the statutory procedure. Plaintiff then brought this suit to set aside the award on the ground of misconduct on the part of the arbitrators. Defendant demurred. The trial court sustained the demurrer, and its decision was affirmed on appeal. The court, after discussing the subject generally and reviewing the previous cases, said:⁵⁸

"That common law arbitration was excluded by our statute is plain. For instance, either party under the former could repudiate the proceedings before an award was actually returned, and even afterwards, should he refuse to pay it, there was nothing left the prevailing party but to bring a suit upon it. Both these burdensome rights are in express terms swept away, for the statute makes the arbitration a preliminary part of judicial hearing, the award in a sense automatically passing into judgment unless the losing party can persuade the court to modify or set it aside."

⁵⁶ It was also argued that the defendant had wrongfully violated the *status quo* and hence that the plaintiff should not be compelled to resort to arbitration before bringing suit. See *Winsor v. German Sav. & Loan Soc.*, 31 Wash. 365, 72 Pac. 66 (1903). The court overruled this contention, stating that whether the defendant's acts were wrongful or not was the very matter in dispute. The court suggested that if it were made to appear that the defendant's acts would result in depriving the plaintiff of the fruits of his award should he prevail, the court might in a proceeding ancillary to the arbitration proceedings take such steps as might be found necessary to preserve the property in dispute pending the termination of the arbitration proceedings. It would seem that this case overruled the *Winsor* case, *supra*.

⁵⁷ 92 Wash. 316, 159 Pac. 129 (1916).

⁵⁸ 92 Wash. p. 319, 159 Pac. p. 131.

Later on in the opinion, the court, in discussing some of the previous cases, said:⁵⁹

"Those who enter into arbitration accept in advance the jurisdiction of the superior court. The board is a preliminary, voluntarily created tribunal or referee, and the jurisdiction of the superior court is first to be exerted in a revisory capacity and only when appealed to by exceptions. If it can not adequately correct errors on the exceptions, it may take the whole controversy over and proceed without a jury. Common law arbitration has ceased to exist. If there is no proper agreement under the statute, then there is no arbitration at all. But once the parties do properly agree on arbitration, there can be no revocation."

The rule of the earlier cases was reaffirmed in the recent case of *Jackson v. Walla Walla*.⁶⁰ This case grew out of a contract which contained an arbitration clause. A dispute having arisen, the plaintiff, instead of continuing operations and appealing to a board of arbitration as required in the contract, abandoned performance and brought suit. The defendant answered denying liability, and set up a counterclaim for damages, alleging a breach of contract by the plaintiff. At the close of the plaintiff's case the defendant withdrew its counterclaim and moved for a nonsuit which was granted. This action was affirmed upon appeal. The court said:⁶¹

"The appeal provided for is to a board of arbitration, and by article 9 it is emphatically stated and agreed that such arbitration is intended to avoid litigation and shall be a condition precedent to any action at law by either party under the contract.

"Such contracts are enforceable."

After quoting from *North Coast R. Co. v. Kraft Co.*⁶² as follows:

"Where a contract provides for a method of adjusting all differences that may arise between the parties, that method must be pursued before either party can resort to the courts for an adjustment,"

the court said:⁶³

"Certainly the rule applies in this case where the contract goes further than those in the cases just cited and provides that arbitration shall be a condition precedent to any action at law "

⁵⁹ 92 Wash. p. 321, 159 Pac. p. 132.

⁶⁰ 130 Wash. 96, 226 Pac. 487 (1924).

⁶¹ 130 Wash. p. 100, 226 Pac. p. 488.

⁶² 63 Wash. 250, 115 Pac. 97 (1911).

⁶³ 130 Wash. p. 101, 226 Pac. p. 488.

There are three cases which, while recognizing the rule under discussion, hold that the agreement to arbitrate did not bar plaintiff's suit. In *Calhoun, Denny & Ewing v. Pederson*⁶⁴ the court held that where the defendant had totally abandoned the contract in which the arbitration agreement was included, it was not necessary for the plaintiff to tender arbitration.⁶⁵ The court placed its decision upon the familiar rule that tender is unnecessary where it is clear that it will not be accepted if made. In *Gile v. Tsutakawa*,⁶⁶ where the contract called for arbitration of "any dispute arising as to the proper fulfillment of the contract," the court held that the dispute which had arisen was not one concerning the "fulfillment" of the contract and hence was not within the arbitration clause.⁶⁷ And in *McNeff v. Capistran*,⁶⁸ where the contract gave each party the "privilege of selecting an arbitrator" the court held that the language of the arbitration clause was not sufficient to show that the parties intended to make arbitration a condition precedent to a cause of action.⁶⁹

There are two cases in which the opinions indicate that the court considered that the common law rule was in effect in Washington.⁷⁰ But as the question was not directly involved in either, they cannot be considered as affecting the cases discussed above. Moreover, the court has twice stated that common law arbitration no longer exists in Washington.⁷¹ Common law appraisal, however, is still in effect.⁷²

⁶⁴ 85 Wash. 630, 149 Pac. 25 (1915).

⁶⁵ See also *The Atlanten*, 252 U. S. 313, 315, 64 L. Ed. 586, 40 Sup. Ct. Rep. 332 (1920) *Jureidini v. National British, etc., Ins. Co., Ltd.*, [1915] A. C. 499.

But if the submission names the arbitrators or board, or for any other reason no action is necessary on the part of the defendant in order to select the arbitrators, there seems to be no reason why the plaintiff in such a case should not be required to proceed before the arbitrators. The defendant's failure to perform the contract should not remove the conditions upon the plaintiff's right to resort to the courts. See 3 WILLISTON ON CONTRACTS, § 1720. And it would seem that this would be more satisfactory to the plaintiff, for arbitration could be had and judgment obtained in a comparatively short time.

⁶⁶ 109 Wash. 366, 187 Pac. 323 (1920).

⁶⁷ But the soundness of this decision may be questioned. The dispute arose over whether or not the defendant, who had purchased goods, had fulfilled his part of the bargain by paying the price called for in the contract. The determination of this question depended upon the meaning of certain words found in the contract.

⁶⁸ 120 Wash. 498, 208 Pac. 14 (1922).

⁶⁹ An examination of the entire arbitration clause involved in this case makes it seem likely that the parties intended to require arbitration, and only used the word "privilege" in connection with the selection of arbitrators. But perhaps it was not clear enough to warrant barring the parties from resorting to the courts.

⁷⁰ *Martin v. Vansant*, note 1, *supra*; *Cogswell v. Cogswell*, note 29, *supra*.

⁷¹ *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*; *Suksdorf v. Suksdorf*, 93 Wash. 667, 161 Pac. 465 (1916).

⁷² *Martin v. Vansant*, note 1, *supra*; *Peterson v. Granger Irrigation District*, 38 Wash. Dec. 21, 243 Pac. 847 (Mar. 4, 1926).

Agreements to arbitrate must have consideration.⁷³ They must definitely indicate what matters are to be arbitrated, and the dispute which has arisen must clearly fall within the description, for a construction in favor of the right to resort to the courts will be adopted.⁷⁴ Where these requirements are fulfilled, the cases just discussed show that the Washington courts will enforce arbitration. But, of course, the agreement to arbitrate may be abandoned by mutual consent.⁷⁵

In the Federal Courts.

In the federal courts the common law rule is in effect.⁷⁶ Consequently actions may be commenced in the federal courts in disregard of existing agreements to arbitrate.⁷⁷ And this is true even though the federal court is sitting in a state where the common law rule has been abrogated and is considering an arbitration agreement made and to be performed in such a state.⁷⁸ Accordingly in two cases which arose in the District Court for the Western District of Washington involving contracts made and to be performed in Washington, the Circuit Court of Appeals for the ninth circuit held that an action might be maintained in the District Court although the contracts contained arbitration clauses.⁷⁹ The court stated that the common law

⁷³ *Barnes v. Spurck*, 121 Wash. 338, 209 Pac. 513, 212 Pac. 583 (1922).

⁷⁴ *Van Horne v. Watrous*, note 47, *supra*, *Klock Produce Co. v. Robertson*, 90 Wash. 260, 155 Pac. 1044 (1916) *Russell & Gallagher v. Yesler Estate*, 89 Wash. 260, 154 Pac. 188 (1916).

⁷⁵ *Engvall v. Buche*, 73 Wash. 534, 132 Pac. 231 (1913).

It would seem that where one party to an arbitration agreement disregards it and commences suit, and the other appears generally and answers to the merits, the parties have "elected to settle their disputes not by arbitration but in a court of law." See *Zimmerman v. Cohen*, 236 N. Y. 15 139 N. E. 764 (1923) *McNeff v. Capistran*, note 68, *supra*. But see *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.*, notes 52, 54, *supra*, and *Jackson v. Walla Walla*, note 60, *supra*, in each of which cases the defendant first set up the arbitration agreement as a bar at the close of the plaintiff's case, having answered to the merits, and the court entered a nonsuit. In the *Jackson* case the defendant had set up a counterclaim but withdrew it in accordance with a stipulation between the parties before moving for the nonsuit.

⁷⁶ *Red Cross Line v. Atlantic Fruit Co.*, note 1, *supra*, and cases cited in the following three footnotes. See also *Hamilton v. Home Ins. Co.*, note 26, *supra*, *Insurance Co. v. Morse*, note 40, *supra*.

⁷⁷ *United States Asphalt R. Co. v. Trinidad Lake P. Co.*, note 18, *supra*; *Aktieselskabet Korn, etc. v. Rederiaktiebolaget Atlanten*, note 41, *supra*; and cases cited in notes 78, 79, *infra*.

⁷⁸ *Mitchell v. Dougherty*, 90 Fed. 639 (C. C. A., 3d Cir., 1898) and cases cited in the following note. See *Jefferson Fire Ins. Co. v. Bierce & Sage*, 183 Fed. 588 (C. C., Mich., 1910).

⁷⁹ *Haskell v. McClintic-Marshall Co.*, 289 Fed. 405 (1923) *Tatsumi Kisen Kabushiki v. Prescott*, 4 Fed. (2d) 670 (1925).

rule is "the established law in the courts of the United States, from which the inferior federal courts are not at liberty to depart."⁸⁰

As the Washington Supreme Court has established the rule that arbitration is a condition precedent to a cause of action,⁸¹ it might seem that where suit is brought on a contract containing an arbitration clause governed by the law of Washington there is no right created which can be the basis of an action in a federal court or in any other court until arbitration is had or tendered. Such a contention was made in a case⁸² brought in a federal court in New York. The contract there involved was governed by the laws of Denmark or Sweden, in both of which countries arbitration is a condition precedent to a cause of action. Judge Learned Hand disposed of this contention as follows:⁸³

"Such clauses, if regarded as conditions precedent to any action, have, I believe, nearly always been held to touch the remedy, and not the right. They do not affect to touch the obligation of the parties, as surely they do not; they prescribe how the parties must proceed to obtain any redress for their wrongs, which covers only remedies. In one sense everything which touches the remedy touches the obligation, since the only sanction to performance rests in the remedy; but that is the speech of philosophers, not of lawyers, among whom the distinction has arisen and is real."

That this question is one of remedy and is governed by the law of the forum seems to be well established.⁸⁴ Thus it is stated by Judge Cardozo:⁸⁵

"An agreement that all defenses arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum."

And that it is one of general law upon which the federal courts do not follow the decisions of the highest court of the state in which they

⁸⁰ *Tatsuuma Kisen Kabushiki v. Prescott*, note 79, *supra*, pp. 672-673.

⁸¹ See pp. 248-254, *supra*.

⁸² *Aktieselskabet Korn, etc. v. Rederaktiebolaget Atlanten*, 232 Fed. 403 (1916).

⁸³ *Ibid.*, p. 405.

⁸⁴ *The Eros*, 241 Fed. 186, 191 (D. C., N. Y., 1916) *Atlantic Fruit Co. v. Red Cross Line*, note 41, *supra*; *United States Asphalt R. Co. v. Trinidad Lake P. Co.*, note 18, *supra*; *Aktieselskabet Korn, etc. v. Rederaktiebolaget Atlanten*, note 82, *supra*.

⁸⁵ *Meacham v. Jameston, F. & C. R. R. Co.*, note 39, *supra*, 211 N. Y. p. 252, 105 N. E. p. 655.

happen to be sitting is equally well established.⁸⁶ Accordingly it has been stated⁸⁷

"The question being one of general law, the decisions of the Court of Appeals of the state of New York are not binding upon the Federal Courts."

That the rule is understood by the Washington Supreme Court to be one of remedy is indicated by the opinion in *Dickie Manufacturing Co. v. Sound Construction & Engineering Co.*⁸⁸

The United States Supreme Court may, however, when next called upon to decide this question, overturn the common law rule. In the last few years the lower federal courts have criticized the rule severely and have indicated clearly that they would no longer follow it if the decisions of the Supreme Court were not binding upon them.⁸⁹ That this criticism of the rule and the growing movement to overturn it have not been without effect upon the Supreme Court is indicated by statements appearing in two recent cases.⁹⁰ In one of them Mr. Justice Holmes stated:⁹¹

"With regard to the arbitration clause we shall not consider the general question whether a greater effect should

⁸⁶ *Atlantic Fruit Co. v. Red Cross Line*, note 41, *supra*, *United States Asphalt R. Co. v. Trinidad Lake P. Co.*, note 18, *supra*.

⁸⁷ *Aktieselskabet Korn, etc. v. Rederiaktiebolaget Atlanten*, note 41, *supra*, 250 Fed. p. 937.

⁸⁸ Note 57, *supra*. See pp. 251-252, *supra*.

⁸⁹ Judge Hough in *United States Asphalt R. Co. v. Trinidad Lake P. Co.*, note 18, *supra*, stated (222 Fed. pp. 1011, 1012) "Neither the Legislature of New York nor Congress has seen fit thus to modernize the ideas of the judges of their respective jurisdictions. I think the decisions cited show beyond question that the Supreme Court has laid down the rule that such a complete ouster of jurisdiction as is shown by the clause quoted from the charter parties is void in a federal forum. It was within the power of that tribunal to make this rule. Inferior courts may fail to find convincing reasons for it; but the rule must be obeyed, and these motions be severally denied."

The same judge in a concurring opinion in *Aktieselskabet Korn, etc. v. Rederiaktiebolaget Atlanten*, note 41, *supra*, stated (250 Fed. p. 939) "As to clause 21, it is undeniable that American authority is at present as stated in the court's opinion; whether the rule as given can long survive historical and logical criticism, I venture to doubt."

Judge Mack in *Atlantic Fruit Co. v. Red Cross Line*, note 41, *supra*, stated (276 Fed. p. 322) "I recognize the growing sentiment in the commercial world, which is principally concerned in these matters, that the law ought not to intervene and render arbitration agreements ineffective (see Cohen, *COMMERCIAL ARBITRATION AND THE LAW*), and the duty of the courts, especially in matters essentially of procedure, to free themselves from anachronistic rules and precedents which are opposed to principles and standards of modern jurisprudence."

⁹⁰ *The Atlanten*, note 65, *supra*; *Red Cross Line v. Atlantic Fruit Co.*, note 1, *supra*.

⁹¹ *The Atlanten*, note 65, *supra*, 252 U. S. p. 315.

not be given to such clauses than formerly was done, since it is not necessary to do so in order to decide the case before us."

And in the other Mr. Justice Brandeis stated:⁹²

"As the constitutionality of the remedy provided by New York for use in its own courts is not dependent upon the practice or procedure which may prevail in admiralty, we have no occasion to consider whether the unwillingness of the federal courts to give full effect to executory agreements for arbitration can be justified."

Under the United States Arbitration Act.

The United States Arbitration Act,⁹³ approved by the President February 12, 1925, went into effect on January 1st of this year. It applies only to maritime contracts and to contracts involving interstate or foreign commerce. Agreements to arbitrate disputes, existing and future, arising out of such contracts are declared to be "valid, irrevocable and enforceable."

The act further provides that where a suit has been brought in a federal court involving a maritime or interstate (or foreign) commerce contract, the court shall stay proceedings when either party makes it appear that arbitration had been agreed upon between them. Or, in case no action has been commenced, a party to such a contract may, provided the federal court would ordinarily have jurisdiction over the controversy, petition the court for an order directing the other party to arbitrate. In case the making of the agreement to arbitrate or the failure to perform it is denied, the court is to hear the matter immediately, allowing a jury trial if demanded, and determine that issue. If resolved against the party raising it, the court shall direct that the parties proceed with their arbitration. In maritime matters the proceedings may be commenced by libel or seizure of the property involved as formerly; the court shall then direct the parties to proceed to arbitrate the dispute in accordance with their agreement. Provision is made for the selection of an arbitrator by the court under certain circumstances, for the summoning of witnesses by the arbitrators, for entering judgment upon the award, and for objecting to and correcting the award.

Of course, the act has not yet been the subject of judicial interpreta-

⁹² *Red Cross Line v. Atlantic Fruit Co.*, note 1, *supra*, 264 U. S. p. 125.

⁹³ Note 2, *supra*.

tion. It was carefully drawn, however, and, as it is very similar to the New York act which has been approved by the United States Supreme Court,⁹⁴ it will probably stand the test of constitutionality.

The act is broad enough to apply to actions commenced in state courts as well as to those instituted in federal courts, and it was so intended by those who drafted it.⁹⁵ It was recognized, however, that it might be held that Congress could not so regulate procedure in the state courts even though maritime and interstate commerce matters were involved.⁹⁶ Consequently, the act was so drafted that such a decision would not affect its application to the federal courts.

II.

THE CONCLUSIVENESS OF THE AWARD.

It is just as vital, if arbitration is to be of any use to the business world as a means of settling disputes, that awards be upheld when made, as it is that agreements to arbitrate be enforced. If the courts are disposed to pry into awards and examine them with critical eyes, then arbitration becomes, as those opposed to its use contend, just another step in a course of litigation already too lengthy and costly

Section 3 of the Washington Arbitration Act⁹⁷ provides that the award after having been signed and sealed up by the arbitrators and delivered to the prevailing party shall be filed with the clerk of the Superior Court, and if no exceptions are filed against it within twenty days, "judgment shall be entered as upon the verdict of a jury, and execution may issue thereon, and the same proceedings (may be had) upon said award, with like effect as though said award were a verdict in a civil action." And Section 5⁹⁸ provides:

"The party against whom an award may be made may except in writing thereto for either of the following causes:

⁹⁴ *Red Cross Line v. Atlantic Fruit Co.*, note 1, *supra*.

⁹⁵ The act was drafted by the Committee on Commerce, Trade and Commercial Law of the American Bar Association. See "The United States Arbitration Law and Its Application," 11 A. B. A. JOUR. 153, an article written by the committee just mentioned.

⁹⁶ For cases bearing on the question of whether Congress may thus regulate procedure in the state courts, see *Northern Securities Co. v. United States*, 193 U. S. 197, 333, 48 L. Ed. 679, 24 Sup. Ct. Rep. 436 (1904) *Board of Trade v. Olsen*, 262 U. S. 1, 67 L. Ed. 839, 43 Sup. Ct. Rep. 470 (1923) *Am. Express Co. v. Iowa*, 196 U. S. 133, 143, 49 L. Ed. 417, 25 Sup. Ct. Rep. 182 (1905).

⁹⁷ Rem. Comp. Stat., § 422.

⁹⁸ Rem. Comp. Stat., § 424.

- "1. That the arbitrators or umpire misbehaved themselves in the case;
- "2. That they committed an error in fact or law;
- "3. That the award was procured by corruption or other undue means."

The Washington Supreme Court decided at an early day that in proceedings arising out of exceptions to an award the Superior Court should not try the matter *de novo* on the evidence submitted to the arbitrators, but may look only to the award and submission to discover errors of fact or law.

This question was first treated comprehensively in *School District v. Sage*.⁹⁹ In that case the court said:¹⁰⁰

"The argument of the learned counsel for appellant, as indicated by their brief, seems to proceed upon the theory that this court will try and determine the matters in controversy between these parties upon the evidence which was submitted to the arbitrators and which has been transmitted to this court as part of the record herein. But such is not the theory of the law. With the merits of the controversy the court had nothing whatever to do."

Upon the question as to how the court was to determine whether errors of fact or law had been committed the court said:¹⁰¹

"If it was the intention of the legislature to require the court, upon hearing exceptions taken to awards, to examine the evidence submitted to the arbitrators, or, in other words, to try the cause *de novo*, it is but reasonable to presume that they would have so declared. And in the absence of such provision, we think we are justified in adopting the rule announced in many well considered cases, and which we believe is subject to but few exceptions, *viz.*, that the errors and mistakes contemplated by the statute must appear on the face of the award, or, at least, in some paper delivered with it."

A few years later the question of considering errors which did not appear from the face of the award or submission again came before the court in *Skagit County v. Trowbridge*.¹⁰² In this case the arbitrator had filed, along with the submission and award, a transcript of the testimony taken before him and findings of fact and conclusions of law

⁹⁹ 13 Wash. 352, 43 Pac. 341 (1896).

¹⁰⁰ *Ibid.*, 13 Wash. p. 355, 43 Pac. p. 342.

¹⁰¹ *Ibid.*, 13 Wash. p. 356, 43 Pac. p. 342.

¹⁰² 25 Wash. 140, 64 Pac. 901 (1901).

The Supreme Court upheld the action of the Superior Court in refusing to consider anything except the submission and award in seeking to discover errors of fact or law. And in the recent case of *Hatch v. Cole*,¹⁰³ the court reaffirmed its early holding that it would not go into the merits of the case or consider errors of fact or law except such as appeared on the face of the submission or award.

III.

THE SUBMISSION AND PROCEEDINGS THEREUNDER.

Any disputes, except such as relate to the title of real estate,¹⁰⁴ may be submitted to arbitration in Washington.¹⁰⁵ The arbitration agreement or submission must be in writing and signed by the parties thereto,¹⁰⁶ and may be in the form of a bond, but this is not indispensable.¹⁰⁷ It may be included as a clause in a contract or other instrument,¹⁰⁸ or it may consist of a separate document.¹⁰⁹ It may provide for any and all disputes which may arise out of certain contracts between the parties,¹¹⁰ or it may include only certain specified disputes.¹¹¹ It may apply to an existing dispute as well as to a future dispute.¹¹² It is not necessary to refer to the statute in the agreement; as common law arbitration no longer exists in Washington, any agreement for arbitration will be considered to have been made under the

¹⁰³ 128 Wash. 107, 222 Pac. 463 (1924).

¹⁰⁴ A dispute over the possession of real estate may be arbitrated: *Taylor v. Basye*, note 30, *supra*.

¹⁰⁵ Rem. Comp. Stat., § 420.

¹⁰⁶ Rem. Comp. Stat., § 421. But see *McElroy v. Hooper* 70 Wash. 347 126 Pac. 925 (1912), where an award was held to be valid and enforceable although not preceded by any written submission.

¹⁰⁷ *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*.

¹⁰⁸ See *Hughes v. Bravinder* note 48, *supra*; *Zindorf Const. Co. v. Western Am. Co.*, note 46, *supra*; *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.*, note 52, *supra*.

¹⁰⁹ See *School District v. Sage*, note 99, *supra*; *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*; *Hatch v. Cole*, note 103, *supra*.

¹¹⁰ *Van Hook v. Burns*, 10 Wash. 22, 38 Pac. 763 (1894); *Zindorf Const. Co. v. Western Am. Co.*, note 46, *supra*; *Winsor v. German Sav. & Loan Soc.*, note 56, *supra*; *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.*, note 52, *supra*; *Mitsubishi Goshi Kaisha v. Carstens Packing Co.*, 116 Wash. 630, 200 Pac. 327 (1921).

¹¹¹ *School District v. Sage*, note 99, *supra*; *Jordan v. Lobe*, 34 Wash. 42, 74 Pac. 817 (1904). See also *Calhoun, Denny & Erving v. Pederson*, note 64, *supra*.

¹¹² *School District v. Sage*, note 99, *supra*; *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*; *Suksdorf v. Suksdorf* note 71, *supra*; *Hatch v. Cole*, note 103, *supra*.

statute unless it fails to comply therewith, in which case there is no arbitration at all.¹¹³ The intention to require arbitration of the dispute which has arisen must be clear.¹¹⁴ It is not necessary to provide that the parties will abide by the award when made; this will be implied.¹¹⁵

The agreement may provide for only one arbitrator,¹¹⁶ or for any number.¹¹⁷ The arbitrator or arbitrators may be named in the agreement.¹¹⁸ It is customary, however, to provide that one arbitrator be selected by each party and that the two thus selected shall choose a third, or that such third arbitrator shall be selected only in case the first two can not agree on an award.¹¹⁹

Many things in connection with the conduct of the arbitration may be regulated in advance in the arbitration agreement.¹²⁰ Among others, it is possible to limit the time within which an award is to be rendered.¹²¹ After this time has expired the arbitrators' authority is gone and the parties are at liberty to resort to the courts.¹²² But this time limit may be waived.¹²³

¹¹³ *Suksdorf v. Suksdorf*, note 71, *supra*.

¹¹⁴ *Van Horne v. Watrous*, note 47, *supra*; *Russell & Gallagher v. Yesler Estate*, note 74, *supra*. See *Klock Produce Co. v. Robertson*, note 74, *supra*.

¹¹⁵ *Suksdorf v. Suksdorf*, note 71, *supra*.

¹¹⁶ Rem. Comp. Stat., § 420; *Hughes v. Bravinder* note 48, *supra*; *Van Hook v. Burns*, note 110, *supra*; *Skagit County v. Trowbridge*, note 102, *supra*; *Zindorf Const. Co. v. Western Am. Co.*, note 46, *supra*.

¹¹⁷ Rem. Comp. Stat., § 420; and cases cited in note 119, *infra*.

¹¹⁸ *Suksdorf v. Suksdorf* note 71, *supra*; *Mitsubishi Goshi Kaisha v. Carstens Packing Co.*, note 110, *supra*.

¹¹⁹ *Jordan v. Lobe*, note 111, *supra*; *Cogswell v. Cogswell*, note 29, *supra*; *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.*, note 52, *supra*; *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*; *McNeff v. Capistran*, note 68, *supra*.

It is probably more advisable to have both parties agree upon all the arbitrators. See Grossman, *op. cit.* note 10, *supra*, where it is stated (p. 320). "Under the rules of the Arbitration Society of America, both parties to a dispute are urged to agree on all of the arbitrators in a given case; in other words, the one, three or more arbitrators who are to hear the evidence and render the award, should represent both parties and thus be able to approach their task with a judicial mind. Under the rules of certain trade organizations, however, each side is permitted to select its own arbitrator, and the two then agree upon a third, who is the umpire; in this manner each side really has its own advocate on the arbitration board rather than an impartial arbitrator."

¹²⁰ *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*. In this case it is stated that only those things can be so regulated as can be the subject of a stipulation in the Superior Court.

¹²¹ *Bachelder v. Wallace*, 1 Wash. T. 107 (1860), *Jordan v. Lobe*, note 111, *supra*; *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*. See *Lidgerwood Park Waterworks Co. v. Spokane*, 19 Wash. 365, 53 Pac. 352 (1898).

¹²² *Jordan v. Lobe*, note 111, *supra*.

¹²³ *Bachelder v. Wallace*, note 121, *supra*; *Jordan v. Lobe*, note 111, *supra*.

After a dispute has arisen between the parties to a contract which contains an arbitration clause, a demand for arbitration should be made by the party desiring to proceed. This demand should be served upon the opposite party, not upon his attorney.¹²⁴ If the opposite party refuses to join in the arbitration, the other may, in cases in which the selection of the arbitrators does not depend upon the acts of both parties, proceed with the arbitration in accordance with the agreement and have judgment entered as provided by statute.¹²⁵ But in cases where the agreement makes it necessary for each party to act in order to select the arbitrators, the party demanding arbitration can only resort to the courts if arbitration is refused.¹²⁶ It is not necessary, however, to tender arbitration when the opposite party has wholly abandoned his contract; suit may be commenced at once.¹²⁷ Resort to the courts may also be had in case the arbitrator selected refuses to act,¹²⁸ or if two arbitrators are unable to select a third where this is required.¹²⁹

It is probable that upon the proper showing, a party may, on commencing arbitration proceedings, resort to the courts in a proceeding ancillary thereto for an order preserving the *status quo* pending the termination of the arbitration proceedings.¹³⁰

Almost anyone may be appointed an arbitrator.¹³¹ Ordinarily a party cannot act as an arbitrator, nor can others interested in the outcome of the arbitration.¹³² Inadequacy of an award will be considered as evidence of interest.¹³³ But the right to object to the appointment of such persons is waived by a failure to object within a reasonable time after obtaining knowledge of the facts.¹³⁴

¹²⁴ *McNeff v. Capistran*, note 68, *supra*.

¹²⁵ *Zindorf Const. Co. v. Western Am. Co.*, note 46, *supra*, *Mitsubishi Goshi Kaisha v. Carstens Packing Co.*, note 110, *supra*.

¹²⁶ See *Winsor v. German Sav. & Loan Soc.*, note 56, *supra*; *Calhoun, Denny & Ewing v. Pederson*, note 64, *supra*.

Under the modern arbitration acts, however, an action may be commenced to compel the opposite party to arbitrate, and either party may at any time apply to the court for the appointment of an arbitrator where for any reason there is a vacancy. See statutes cited in notes 2 to 5, *supra*.

¹²⁷ *Calhoun, Denny & Ewing v. Pederson*, note 64, *supra*.

¹²⁸ *Russell & Gallagher v. Yesler Estate*, note 74, *supra*.

¹²⁹ *Cogswell v. Cogswell*, note 29, *supra*, *Richardson v. Harkness*, 59 Wash. 474, 110 Pac. 9 (1910).

¹³⁰ See *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.*, note 52, *supra*.

¹³¹ See *State ex rel. Noble v. Bowlby*, 74 Wash. 54, 132 Pac. 723 (1913).

¹³² *Glover v. Rochester German Ins. Co.*, 11 Wash. 143, 39 Pac. 380 (1895) (but see *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*, as to this case) *Klock Produce Co. v. Robertson*, note 74, *supra*.

¹³³ *Glover v. Rochester German Ins. Co.*, note 132, *supra*.

¹³⁴ *State ex rel. Noble v. Bowlby*, note 131, *supra*.

The arbitration proceedings and the award must comply with the terms of the submission,¹³⁵ but a substantial compliance is sufficient.¹³⁶ It is not necessary to proceed with the formality of a court,¹³⁷ nor are the arbitrators bound to follow strict rules of law, especially where these are uncertain.¹³⁸

The arbitrators are given the power by statute to summon witnesses and utilize the ordinary machinery of trial courts in order to produce testimony.¹³⁹ They may consider evidence not admissible according to technical common law rules.¹⁴⁰ They must give each party an opportunity to appear before them, present his case, and introduce evidence.¹⁴¹ It is not sufficient merely to permit each party to submit a written statement of his position.¹⁴² Furthermore, each party has the right to be present when the other presents his case.¹⁴³ Failure of the arbitrators to observe these rules amounts to misconduct and renders the award subject to exception.¹⁴⁴ The arbitrators must give their personal attention to the evidence in deciding the dispute.¹⁴⁵ If the arbitrators fail to proceed promptly or refuse to proceed at all, they are subject to certain statutory penalties,¹⁴⁶ and can probably be compelled to act with reasonable expedition by mandamus.¹⁴⁷ Where three arbitrators have qualified and later one withdraws, the two remaining may proceed to an award in case the party whose arbitrator has withdrawn refuses to appoint a successor.¹⁴⁸

The award should be signed and sealed up by the arbitrators and delivered, together with a signed copy thereof, to the prevailing party.¹⁴⁹ It may be made by a majority of the arbitrators if this is

¹³⁵ Rem. Comp. Stat., § 422. See *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*.

¹³⁶ *Bachelder v. Wallace*, note 121, *supra*.

¹³⁷ *Brown's Executors v. Farnandis*, 27 Wash. 232, 67 Pac. 574 (1902).

¹³⁸ *School District v. Sage*, note 99, *supra*.

¹³⁹ Rem. Comp. Stat., § 426.

¹⁴⁰ *School District v. Sage*, note 99, *supra*; *Hatch v. Cole*, note 103, *supra*. But see Rem. Comp. Stat., § 427.

¹⁴¹ *McDonald v. Lewis*, 18 Wash. 300, 51 Pac. 387 (1897). *Brown's Executors v. Farnandis*, note 137, *supra*. See *McCann v. Alaska Lumber Co.*, note 31, *supra*.

¹⁴² *Brown's Executors v. Farnandis*, note 137, *supra*.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Van Hook v. Burns*, note 110, *supra*.

¹⁴⁶ Rem. Comp. Stat., § 423.

¹⁴⁷ *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*.

¹⁴⁸ *Ibid.* See also *American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*, 240 N. Y. 398, 148 N. E. 562 (1925).

¹⁴⁹ Rem. Comp. Stat., § 422. See *McCann v. Alaska Lumber Co.*, note 31, *supra*.

agreed upon between the parties.¹⁵⁰ The prevailing party should file the original with the clerk of the Superior Court and serve the copy upon the other.¹⁵¹ If no exceptions are filed within twenty days thereafter, the prevailing party may have judgment entered.¹⁵²

The jurisdiction of the Superior Court over the parties is obtained by the act of the parties in entering into the agreement to arbitrate which operates as a consent to its jurisdiction.¹⁵³ Consequently it is not necessary to serve a copy of the award upon the losing party in the manner provided for the serving of a summons.¹⁵⁴ The agreement to arbitrate also acts as a waiver of a jury so that if for any reason the arbitration fails, the Superior Court proceeds with the case without a jury.¹⁵⁵

As errors of law or fact, in order to sustain exceptions to the award, must appear from the face of the award,¹⁵⁶ the refusal of arbitrators to accept proof in support of an item or to allow an item, or the allowance of an item not supported by proof, cannot be taken advantage of by way of exception based upon error of law or fact unless these matters appear from an examination of the award and submission;¹⁵⁷ but the failure of the arbitrators to decide one of the material matters in dispute is sufficient ground for an exception.¹⁵⁸

Misbehavior in order to constitute sufficient ground for sustaining an exception to an award must be based on an intent to do wrong.¹⁵⁹ A statement by arbitrators that they will not be bound by the evidence, and the refusal of two of the arbitrators to listen to the third are not sufficient to sustain an exception.¹⁶⁰ But the arbitrators must be sufficiently informed as to the dispute between the parties or the award will not be sustained.¹⁶¹ The court may set aside an award for bias and prejudice.¹⁶²

¹⁵⁰ Rem. Comp. Stat., § 422. *Bachelder v. Wallace*, note 121, *supra*.

¹⁵¹ Rem. Comp. Stat., § 422.

¹⁵² *Ibid.*

¹⁵³ *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*, *Mitsubishi Goshi Kaisha v. Carstens Packing Co.*, note 110, *supra*.

¹⁵⁴ *Mitsubishi Goshi Kaisha v. Carstens Packing Co.*, note 110, *supra*.

¹⁵⁵ *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*. See also *Berkovitz v. Arbib & Houlberg*, note 42, *supra*.

¹⁵⁶ *Supra*, pp. 258-260.

¹⁵⁷ *Hatch v. Cole*, note 103, *supra*.

¹⁵⁸ See *McElroy v. Hooper*, note 106, *supra*.

¹⁵⁹ *Hatch v. Cole*, note 103, *supra*.

¹⁶⁰ *Ibid.*

¹⁶¹ *McDonald v. Lewis*, note 141, *supra*.

¹⁶² *McCann v. Alaska Lumber Co.*, note 31, *supra*.

Where an award is found to be defective, the court may refer the matter back to the arbitrators with proper instructions.¹⁶³ But if this is impossible, as, for example, where an arbitrator has become disqualified,¹⁶⁴ the court will set aside the award and try the matter itself.¹⁶⁵ An order setting aside an award is not appealable.¹⁶⁶ Prejudice on the part of the arbitrators and misconduct, and errors of law in the award can only be taken advantage of on exceptions to the award and by appeal from the judgment entered thereon.¹⁶⁷

The action of the Superior Court following the filing of an award is a special statutory proceeding and it is not necessary for the court to make findings of fact and conclusions of law.¹⁶⁸

At common law if the loser refused to pay an award, there is nothing left for the prevailing party to do but bring an action upon it.¹⁶⁹ The Washington Supreme Court has held that this right is "in express terms swept away."¹⁷⁰ It would seem to follow that the only way to take advantage of an award is to file it and have judgment entered in accordance with Remington's Compiled Statutes, Section 422. And it has accordingly been held that an unfiled award is of no effect, and will not bar an action in disregard of it.¹⁷¹ But an award made in pursuance of common law arbitration in a state where common law arbitration exists will be enforced in Washington and will sustain an action brought upon it, and will also, even if not filed, act as a bar to any action brought in disregard of it.¹⁷²

IV

CONCLUSION.

From the foregoing it will appear that arbitration is available to the people of Washington as an effective method of settling their disputes.

¹⁶³ *In re O'Rourke Bros.*, 36 Wash. Dec. 391, 240 Pac. 673 (1925).

¹⁶⁴ *Tacoma R. & M. Co. v. Cummings*, note 45, *supra*.

¹⁶⁵ *Ibid*; *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*.

¹⁶⁶ *Tacoma R. & M. Co. v. Cummings*, note 45, *supra*.

¹⁶⁷ *McElroy v. Hooper*, note 106, *supra*; *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*.

¹⁶⁸ *Hatch v. Cole*, note 103, *supra*.

¹⁶⁹ See *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, note 57, *supra*.

¹⁷⁰ *Ibid.*, 92 Wash. p. 319, 159 Pac. p. 131.

¹⁷¹ *Owen v. Casey*, note 30, *supra*. But in *Barnes v. Spurck*, note 73, *supra*, where the action had apparently been brought upon the award, the court indicated no disapproval of such a procedure. The decision in the case, however, made a discussion on this matter unnecessary.

¹⁷² *Taylor v. Basye*, note 30, *supra*.

They may, when entering into a contract, include therein a clause¹⁷³ providing that in case any dispute should arise out of the contract it shall be submitted to arbitrators whose decision shall be final, and the courts will enforce this agreement. Or, if a dispute has arisen which promises years of expensive and burdensome litigation and the destruction of a valuable business relationship, they may agree to arbitrate the matter before persons familiar with the subject-matter involved and in whose fairness they have confidence and stipulate for an immediate decision, thus settling the whole matter without great expense and before the dispute has become so bitter as to make further business relations between them impossible.

The arbitrators may be selected with particular reference to the specific dispute which has arisen. Thus where trade customs or practices are in dispute, a board consisting of men familiar with the trade in question may be chosen. Accountants may be named where complicated accounts are involved;¹⁷⁴ engineers to settle engineering problems. Unlike judges and juries, such triers of disputes do not in addition to mastering the facts of the case in hand, have to crowd into a few hurried days the acquisition of highly technical knowledge. Persons who already have the requisite technical training may be selected. And they can study the matter carefully, as there is no pressure from waiting cases to coerce them into doing the best they can in a day or two in order to get on with the docket. As they are not bound by the technical rules of evidence applied in the courts, they can consider anything having a bearing upon the matter in dispute and give it such weight as they believe it entitled to.

The enactment of a new arbitration law in Washington, similar to the acts now in effect in New York and New Jersey,¹⁷⁵ such as that proposed by House Bill No. 168, is not necessary in order to make arbitration a useful method of settling disputes. These modern acts have but three distinctive features. First, the provision making executory agreements to arbitrate valid, enforceable and irrevocable, second, the

¹⁷³ See note 9, *supra*. See also the arbitration clauses involved in the following cases: *Zindorf Const. Co. v. Western Am. Co.*, note 46, *supra*; *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.*, note 52, *supra*, *Jackson v. Walla Walla*, note 60, *supra*. But see the clauses involved in *Gile v. Tsutakawa*, note 66, *supra*, and *McNeff v. Capistran*, note 68, *supra*.

¹⁷⁴ " Arbitrators are more competent to the settling of complicated accounts than the officers of courts of law or equity " Lord Kenyon in *Halfhide v. Fenning*, note 19, *supra*.

¹⁷⁵ Notes 3, 4, *supra*.

¹⁷⁶ Note 11, *supra*.

provision requiring that actions brought in disregard of such agreements be stayed, and third, the provision allowing the institution of proceedings to compel the other party to such an agreement to arbitrate. The first two of these provisions are now law in Washington by judicial decision;¹⁷⁷ the third might well be adopted. The other provisions of these acts merely set forth the details of the procedure to be followed in obtaining an award and turning it into a judgment. To adopt a complete act such as House Bill No. 168 would be to substitute a new and uncertain system of procedure for one which has become well defined by judicial decision without any compensating advantage. As most of these matters are questions of procedure,¹⁷⁸ it would seem that any changes in the existing law which are found advisable can be made by a few simple rules of court under the recently enacted Washington statute giving complete rule-making power to the Supreme Court.¹⁷⁹

Judge Mackintosh stated in a recent case:¹⁸⁰

"It is persuasively argued by appellants' counsel that to sanction arbitration awards made such as the one here is to

¹⁷⁷ *Supra*, pp. 248-254.

¹⁷⁸ The Washington arbitration statute was once a part of the Civil Practice Act. See note 12, *supra*.

¹⁷⁹ "An act to promote the speedy determination of litigation on the merits and authorizing the Supreme Court to make rules relating to pleading, procedure and practice in the courts of this state," approved by the Governor on January 12, 1926. See Paul, "The Rule-Making Power of the Courts," 1 WASH. L. REV., 163, 223.

The modern acts contain three provisions, the adoption of which would probably be an improvement on the existing law.

First, the provision allowing either party to a contract containing an arbitration clause to commence an action to compel the other to arbitrate. With such a provision in effect one party to such an agreement may often be able to have a dispute arbitrated which might otherwise become the subject of litigation in a court which does not enforce arbitration agreements except in an action for damages. See *Red Cross Line v. Atlantic Fruit Co.*, note 1, *supra*, in which case the Supreme Court upheld an order of a New York state court directing the defendant to arbitrate a dispute arising out of a charter party containing an arbitration clause.

Second, the provision authorizing the courts to fill any vacancies among the arbitrators upon the application of either party. This may often enable one party to an arbitration agreement to have a dispute settled by arbitration although the other, in order to force the matter into court, refuses to appoint an arbitrator as required by the agreement.

Third, the provision for determining at the outset in a summary fashion all questions as to the validity of the contract containing the arbitration agreement.

It might also be well to incorporate in a rule the suggestion made in *Herring-Hall-Marvin Safe Co. v. Purcell Safe Co.*, note 52, *supra*, that where necessary in order to insure justice, the court might in a proceeding ancillary to the arbitration proceedings make appropriate orders for preserving property pending the termination of the arbitration proceedings.

¹⁸⁰ *Hatch v. Cole*, note 103, *supra*.

give to arbitrators the power to arbitrarily decide the disputes. That seems to have been the legislative intent, for by the statute arbitrators are given the right to determine both the law and their own method of finding the fact, and it was with knowledge of that legal situation that the parties hereto submitted their controversy to arbitration. If it were not so, and the courts were allowed to try these matters *de novo*, the legislature would merely have added to the uncertainty and delay of litigation instead of decreasing it, as was their evident intention by providing for the informal and speedy method of disposing of controversies."

As long as the Supreme Court retains this attitude, arbitration can be depended upon as a prompt, inexpensive and effective method of settling disputes.

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